No. 17-494

# In The
# Supreme Court of the United States

SOUTH DAKOTA,

*Petitioner,*

v.

WAYFAIR, INC., OVERSTOCK CO., INC., AND NEWEGG, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of South Dakota**

## *AMICUS CURIAE* BRIEF OF AMERICAN CATALOG MAILERS ASSOCIATION IN OPPOSITION TO THE PETITION


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## INTEREST OF *AMICUS CURIAE*[1]

The American Catalog Mailers Association (ACMA) was founded in 2007 to advocate for catalog marketers and their suppliers. The ACMA is a non-profit organization established under Section 501(c)(6) of the Internal Revenue Code. The ACMA is the leading trade association in the United States representing the interests of businesses, individuals, and organizations engaged in and supporting catalog marketing.

Catalog sales remain a vital part of the economy. More than one-half of Americans shop using catalogs. More than 9,000 companies use catalogs to make sales and many of these sellers are small and medium-sized entities. Catalogs have historically received the highest order response from consumers among any marketing medium.

The Supreme Court's decisions in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) have served as pillars of the catalog industry's protection from the imposition of unduly burdensome state and local sales and use tax collection and remittance obligations for the past 50 years. Reliance upon the physical presence requirement of *National Bellas Hess* and *Quill* has been significant in the continued growth

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[1] Petitioners and Respondents filed Blanket Consents to the filing of *amicus* briefs with the Clerk's Office on October 16, 2017 and October 19, 2017 respectively. On November 27, 2017, *Amicus* notified the parties of the intention to file a brief in support of Respondent. *Amicus* affirms that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution to fund the brief's preparation or submission.

of the industry and remains important today, even as the mail order industry evolves.

Catalogs play a significant role in many sellers' multi-channel marketing efforts. They are closely associated with both internet sales and brick and mortar sales. Collecting sales and use tax on catalog sales, however, continues to present unique challenges just as they did in 1967 and 1992.

Catalog sales represent the most universal source of goods, especially in rural areas, which are often far removed from stores and not typically wired for high-speed internet. Catalog sales are available to customers concerned with online transactional safety in that the catalog sellers generally provide both mail and phone ordering capabilities in addition to online ordering. Catalogs meet the needs of shut-ins, handicapped persons or older consumers and the use of catalogs increases with the age of the consumer. The use of catalogs, however, is not limited to older Americans. Beyond merely the elderly, baby boomers buy more from catalogs per capita than any other generation, and studies show that millennials use catalogs when making purchases. Catalogs present new products not yet known to consumers and provide better knowledge of certain types of products whose marketing requires information that is more detailed. Some catalog sellers continue to receive orders by mail with payments by check accounting for as much as 30% of all sales, which presents special challenges in complying with the tax rules of multiple jurisdictions.

## SUMMARY OF ARGUMENT

In *National Bellas Hess*, the Court weighed the interests of the states in collecting revenue with the burdens on interstate commerce that arise by requiring mail order sellers to collect use tax on behalf of taxing districts across the United States. The burden on interstate commerce applicable to mail order sellers is a function of the varying and changing tax rates, differing record keeping and compliance requirements across the more than 12,000 taxing districts that exist in the United States today. In *National Bellas Hess*, the Court limited collection responsibility to the situation in which the mail order seller had a physical presence within the state as a means of addressing the burdens on interstate commerce.

The Court in *Quill* reaffirmed the determination in *National Bellas Hess* under the Commerce Clause, despite the claims by the states and localities in *Quill* that the technology and the nature of the business of making sales had changed in the 25 years between *National Bellas Hess* and *Quill*. Ironically, 25 years after *Quill*, the states make the same arguments. The states argue that technology has solved the sales and use tax collection difficulties. To ACMA members and other businesses that rely on printed catalogs, however, this is anything but the case. As the Court recognized in *Quill*, catalog marketers had continued to rely upon the physical presence standard. Post-*Quill*, that reliance has continued even as catalog sellers have evolved with changes in the marketplace brought about by the internet.

In 2017, the inherent complexity of the process of complying with sales and use taxes in the United States remains burdensome. In many ways, the nationwide sales and use tax system has actually become dramatically *more* complex. In comparison to the 2,300 local taxing jurisdictions at the time of *National Bellas Hess*, and the 6,000 taxing jurisdictions at the time of *Quill*, now more than 12,000 state and local jurisdictions exist in the United States that impose a sales or use tax. Absent real simplification of the collection process, technology cannot overcome the nature of the fundamental burden on mail order sellers with customers in multiple states and local jurisdictions.

The states offer no meaningful alternative to the physical presence standard. The states seek outright reversal of *Quill* and carte blanche authority for whatever varying requirements that each state or municipality separately chooses to enforce upon mail order companies and other remote sellers engaged in interstate commerce. The absence of a meaningful alternative to the physical presence standard for regulating interstate sales supports rejection of the petition at this time.

The limitations on state taxing power in the era of electronic commerce have received the continued attention of Congress through adopted and proposed legislation. Congress acted to regulate state and local tax impositions on the internet in 1998. Internet Tax Freedom Act of 1998, 47 U.S.C. § 151 (Pub. L. No. 105-277). In the intervening years, Congress has revisited the terms of that Act, repeatedly extending it and

making it permanent in 2016. Congress has considered several different legislative proposals to address the complexity of compliance for sellers in the interstate markets.

While legislative proposals to address sales and use tax collection have passed a single chamber, no bill has passed Congress. These legislative proposals show that the *National Bellas Hess* and *Quill* decisions reveal sensitive policy concerns. The Court should not intervene in a case instituted by a state when that litigation is being substituted for continuing efforts to achieve real solutions to the continuing burdens on interstate commerce.

The states themselves recognize the inherent complexities for remote sellers in collecting sales and use taxes in multiple jurisdictions. Some of the states have been working to address the complexity of the sales and use tax collection system through their participation as members in the Streamlined Sales Tax Governing Board, Inc. (SSTGB) project by adopting common definitions and attempting to address inherent difficulties in the collection process. The SSTGB has adjusted its simplification standards in a bid to attract additional states. Many states rejected participation in the Streamlined Sales and Use Tax Agreement as full members, however, including states representing some of the largest markets in the United States. Thus, the burdens on mail order sellers have not been meaningfully addressed by SSTGB or otherwise. The lack of agreement among the states at this time counsels

caution from the Court in revisiting *National Bellas Hess* and *Quill* now.

## ARGUMENT

### A. Introduction

South Dakota's challenge to this Court's decisions in *National Bellas Hess* and *Quill* relies on identical arguments raised in 1967 and 1992. In those decisions, the Court acknowledged the importance of the revenue collection authority of the states but balanced that authority against the correlative burden placed on interstate commerce. Reflecting these competing valid interests, the Court approved the use of the in-state physical presence requirement as the trigger for the sales and use tax collection responsibility. The physical presence standard remains a means of upholding the authority of the states and localities to compel collection of tax from out-of-state sellers while limiting that authority to prevent undue burdens on interstate commerce. In *Quill*, the Court noted that Congress could develop viable alternatives to the physical presence standard. To date, no such alternative has met Congressional approval or commanded acceptance widely among the states. The Court's acknowledgement in *Quill* that Congress might intervene reflected the fundamental concern that the legislative branch institutionally is better suited to evaluate competing policy questions, such as how to weigh the revenue needs of the states versus the need for interstate commerce to

proceed unburdened. Recognizing that certain tax policy considerations are difficult to resolve does not warrant the conclusion that this Court should abandon the standard upon which mail order companies have relied for more than half a century.

Nowhere does South Dakota or its supporters offer any alternative to the physical presence standard other than a loose economic nexus requirement – selling to customers in the states – with each state free to establish a separate dollar threshold of sales volume triggering the sales and use tax collection responsibility. Under South Dakota law, a company may have as few as 200 separate transactions a year in South Dakota, and generate as little as a few thousand dollars yet be subject to tax collection, remittance and reporting. The states seek virtually unrestrained authority to require collection from remote sellers.

### B. The Continuing Reliance Interest of the Mail Order Industry Properly Warrants Retention of the Physical Presence Standard Until a Meaningful Substitute Can Be Implemented.

Catalog sellers continue to operate in a manner that merits the protection of the physical presence standard. On average, 11% of catalog purchases are paid by check, and some catalog sellers receive checks for more than 30% of their sales. The receipt of checks means that if the customer incorrectly determines the taxable or exempt status of the purchase or the

applicable tax rate, the seller is confronted with a difficult task. The seller must either (a) return the check to the customer, (b) absorb the loss and pay the additional tax due directly, or (c) issue an additional bill for the balance due or a refund. The error could be small so that either the generation of an additional bill or refund is not economical. Unless refunds are made to the consumers, the overpayments would have to be paid to the states from whom consumers realistically could not seek refunds under these circumstances.

For underpayments, it may be necessary for the mail order companies to make up the deficiency. It is often not practical to go back to the customer seeking to collect the shortfall. Cumulatively, the small underpayments become an economic burden on the sellers, especially for those with small profit margins.

The proper evaluation of the taxable status of purchases remains difficult because of its complexity. The states and localities do not provide clear guidance. An exemption may depend on the status of the customer, e.g., whether engaged in manufacturing, or operating as one of certain statutorily defined types of charitable organizations. Other exemptions are dependent on the consumer's specific use of the item or service, such as using the item in certain types of manufacturing activities. These determinations remain challenging today notwithstanding available software. The coding of dynamic retail inventories that may easily number into the tens of thousands of distinct Stock Keeping Units (SKUs) is a very judgment-intensive exercise replete with opportunities for honest errors creating unknown

liabilities for future penalties and interest (in addition to uncollected tax). Moreover, some states offer sales tax holidays providing temporary exemptions for certain items, such as some, but not all, school supplies, clothing or computers for one weekend a year. The classes of items that qualify for these exemptions differ from state to state as do the calendar dates when these holidays occur.

Software does not solve the problem, or printing expense, of communicating the complexities of a nationwide sales tax collection process to mail order purchasers as a part of the text of the catalog. Moreover, the cost of implementing the software in the first instance is a significant expense even should software be provided by the states. Many catalog marketers rely on home grown and specially-developed software to run their operations, warehouse, inventory management, order processing, customer service and other enterprise activities. Each time the state-provided software is updated, each of the sellers' legacy systems must be modified to map to and interact with that software. Technology does not prevent the ongoing expense of implementing the software, coding inventories, updating the software, maintaining compliance, revising customer-facing communications, training personnel, answering customer questions, administering tax law changes, recordkeeping, and responding to audits by multiple jurisdictions.

The use of the internet by the catalog customer does not alleviate the burdens. Some customers do not have access to the internet. Customers using a web

connection after referencing the catalogs then must grapple with multiple state and local systems that remain both difficult and confusing for the taxability determinations and other elements of compliance.

Catalog sellers focusing on business-to-business (B-to-B) sales make few, if any, taxable retail sales when the merchant sells inventory or other items that are not typically taxable in the states and localities. Those merchants nevertheless must accumulate exemption certificates from all of their customers on a nationwide basis under the states' laws or face an assessment against the merchant for the failure to collect. The cost of compliance easily could exceed the total tax revenue the states would receive from these sales.

### C. Congress Has Examined the Interstate Commerce Implications of Sales and Use Tax Collection, But the States Have Failed to Convince Congress That Enough Has Been Done by the States and Localities to Warrant Changing the Rules.

The Addendum to the Brief of *Amicus Curiae* of Four United States Senators and Two United States Representatives in Support of the Petition shows why the Court should not usurp regulation of interstate commerce from Congress. The Addendum recites a significant number of instances when Congress took up the issues arising from imposing sales and use tax collection responsibility on remote sellers from 2001 to

the present. The latest proposals for reform were put forward in April 2017.

Contrary to the states' position, the absence of successful federal legislation does not warrant a finding that the Congressional effort is a failure or that legislation is not needed. Congressional action can take time to reach fruition. Congress first addressed the taxation of the internet by the Internet Tax Freedom Act of 1998 (Pub. L. No. 105-277). That Act imposed restrictions on the states' imposition of tax on the internet because Congress recognized that the tax on the internet would harm interstate commerce. In the intervening years, Congress has revisited the terms of the Internet Tax Freedom Act several times, finally making its provisions permanent in the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114–125), on February 24, 2016, thus ending a process of more than 18 years.

Congress may yet change the rules for imposing collection responsibilities on interstate commerce. The U.S. Constitution expressly assigns to Congress the role of regulating interstate commerce in Article I, Section 8. The Court should defer to Congress when (a) this Court has set forth, and then re-affirmed, a specific bright line standard in its decisions in *National Bellas Hess* and *Quill*, (b) Congress has taken up the specific issue of whether the Court's standard should be abandoned, but (c) Congress has left the Court's standard in place. "The underlying issue here is one that Congress may be better qualified to resolve and

that it has the ultimate power to resolve." *Quill*, Syllabus 2(d).

### D. Real Simplification of the Requirements for Sales and Use Tax Collection Imposed on Remote Sellers Is Possible and Must Precede the Abandonment of the Physical Presence Requirement Applicable to Sales Made in Interstate Commerce.

A major reason that Congress has not passed legislation in response to *Quill* is the failure of the states to agree to make changes necessary to reduce the burdens on interstate commerce. In 1999, a group of states responded to the *Quill* decision by forming what is now the Streamlined Sales Tax Governing Board, Inc. (SSTGB) to address the "practical and pragmatic concerns" in *National Bellas Hess* and *Quill* and to focus "its work on lessening burdens on participating sellers." Brief for *Amicus Curiae* Streamlined Sales Tax Governing Board, Inc. in Support of Petitioner at 3. The SSTGB, however, has failed to achieve the required lessening of the burdens on sellers and has failed to attract states representing large portions of the United States market.

A fundamental limitation on the effectiveness of the SSTGB is the failure to enlist more states including several of the larger states. Only 24 states are members of the Streamlined Governing Board. SSTGB *Amicus* Brief at 1-2. The advisor (non-member) states include Alabama, Arizona, California, Connecticut,

District of Columbia, Florida, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Mexico, New York, Puerto Rico, South Carolina, Texas, and Virginia. Id. at 2, footnote 4.

The Office of Tax Policy Analysis of the New York State Department of Taxation and Finance in an October 2006 Report, updated on the New York State website on June 29, 2017, discussed whether New York should become a Streamlined state.[2] The New York Report candidly explained that New York has not adopted the Streamlined Sales and Use Tax Agreement because it is unsure whether it would benefit New York residents.

> New York's existing sales tax has been structured to reflect the policy and revenue priorities of State and local policymakers. A significant number of changes to this structure would be necessary before New York could certify that it substantially complies with the [Streamlined Sales and Use Tax] Agreement. Some of these changes could promote a simpler tax structure; others would limit the flexibility of the State in crafting its annual financial plan and providing for the revenue needs of localities.
>
> Legislation to modernize and simplify the New York sales tax would be worthwhile, but it is unclear if the proposal developed by the

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[2] https://www.tax.ny.gov/pdf/stats/policy_special/streamlining_new_yorks_sales_tax_october_2006.pdf. Last visited on November 25, 2017.

> Streamlined project would yield net benefits to New York's taxpayers and local businesses. There are, however, provisions of the Agreement which State policymakers may determine would provide benefits to New York. The likelihood of the State and its localities generating vast amounts of "new" sales tax revenue from taxing mail order and e-commerce sales is low. As the Streamlined project moves forward, New York's policymakers may wish to consider a number of options, including the option of adopting some, but not all, of the Agreement's provisions to realize some benefits of simplification short of full conformity.
>
> Bracketed material added.

SSTGB, whose very existence is a direct response to *Quill* in a quest for a system that would lessen the burdens on remote sellers, has been rejected by New York and other states representing major U.S. markets. New York explicitly recognizes the benefits of lessening the burdens uniquely imposed on remote sellers shipping products nationwide. New York nevertheless rejects joining with the Streamlined states in working toward real uniformity. *Quill* remains necessary so long as the states and localities decline to seek simplicity, some measure of uniformity, and a lessening of the burdens on remote sellers.

Sales and use taxes, like most systems, and all tax systems, have experienced increased complexity over time. Many elements could be cited that contribute to increased complexity and resulting increased difficulty

in compliance from 1992 to the present. In the case of direct mailers, (a) many more diverse local taxing jurisdictions now exist – at least 12,000; (b) many more new and previously unimagined products are being developed that must be classified as taxable, exempt or even partially exempt under state or local laws; and (c) the expansion of the use of tax holidays by states adopting differing calendar dates when the exemptions are expanded temporarily especially for school supplies, certain types of clothing and computer items. In some states, the lack of uniformity even extends to the local level when the laws of the localities are not applied uniformly across a single state. New compliance challenges, like the continuing challenges addressed in both *National Bellas Hess* and *Quill*, present policy issues best addressed by the states working together with taxpayer input to reduce complexity and by Congress setting the rules.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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